No. 82-1631

In the Supreme Court of the United States

OCTOBER TERM, 1982

POTAMKIN CADILLAC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the district court erred in denying a Rule 60(b), Fed. R. Civ. P., motion for a new trial.

1. On February 1, 1980, the Federal Trade Commission issued a special order directing petitioner to file an informational report covering the last quarter of 1979 within 10 days of receipt of the order (Pet. App. A3). Petitioner acknowledged receipt of the order by registered mail on February 11, 1980. It did not respond within the required 10 days, nor did it move to quash or limit the order, or to obtain an extension of time for responding (*ibid.*). On March 11, 1980, the FTC served a default notice on petitioner, stating that a statutory penalty for failure to file would begin to run on April 12, 1980. When no report was forthcoming, the United States, on behalf of the FTC, brought an action on September 3, 1980, in the United States District Court for the Southern District of New York

seeking compliance with its order and statutory penalties (Pet. App. A-3). Ultimately, by letter of May 8, 1981, petitioner's counsel submitted a partial report to government counsel, consisting of a single undated sheet without identifying notations, and this letter was deemed an acceptable filing. The report thus was filed 391 days after the statutory penalty period began and 248 days after the government filed its complaint in the case (*ibid.*).

In January 1982, the government filed a motion for summary judgment in the district court litigation, seeking statutory penalties for late filing. In response to the government's motion, petitioner's attorney, Philip Beane, filed an affidavit that made the unsupported assertion that "[t]o the best of [petitioner's] knowledge, the report was filed in a timely fashion." Neither this affidavit nor any other document before the court averred any personal knowledge of filing (Pet. App. A4). The district court granted the government's summary judgment motion (Jt. App. A59-A62).[1] The court concluded that "no genuine issue of fact is created by such an unsubstantiated surmise or conjecture by" petitioner and that petitioner had failed to allege "when the report finally submitted was executed or where it came from" (*id.* at A61).

The court of appeals affirmed (Pet. App. A1-A6), agreeing that attorney Beane's unsupported assertions did not defeat a summary judgment motion, which "must be as obvious to him as it is to us" (*id.* at A5).[2] The court of appeals also assessed double costs and $500 attorneys fees against petitioner and attorney Beane jointly on the ground

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[1]"Jt. App." refers to the appendix in the court of appeals in No. 82-6155.

[2]The court also upheld the FTC's authority to require the report under 15 U.S.C. (Supp. V) 46(b), and it rejected petitioner's belated contention that the FTC order was confusing (Pet. App. A5-A6).

that the appeal was "totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence * * *, an imposition on the government which is forced to defend against the appeal and on the taxpayers who must pay for that defense" (*id.* at A6).

2. While this appeal was pending, petitioner filed a motion in the district court, alleging newly discovered evidence "which by due diligence could not have been discovered in time to move for a new trial * * *." Fed. R. Civ. P. 60(b)(2). See Pet. App. A9. This motion was supported by an affidavit of Marvin Schell, who had been petitioner's controller in 1980. He stated that within two weeks of the time that petitioner was served with the complaint in this action (*i.e.*, September 9, 1980), he had sent a complying report to the FTC by certified mail, return receipt requested (*id.* at A9-A10). Petitioner also submitted two affirmations by attorney Beane. The first stated that Beane had only recently been able to locate Schell, specifically stating (*id.* at A10):

> I can state as my own knowledge that I was informed by MR. SCHELL at the time that this proceeding was served upon the defendant that the report would be filed shortly thereafter, and that it was filed shortly thereafter, and that the copy of the report that I had supplied to the U.S. Attorney was a copy given to me by MR. SCHELL within two (2) weeks of that date.

Beane's second affirmation reiterated that Beane had been informed in September 1980 that Schell had filed a report in that month (*ibid.*).[3] In response to the Rule 60(b) motion,

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[3]This assertion was directly contrary to Beane's earlier statements to government counsel, a part of the record in the district court, that he did not know which employee made the alleged filing, or any "specifics of the filing." See Pet. App. A4.

the government informed the court that the FTC had no record of receiving the alleged September 1980 report, and petitioner at no time produced the return receipt that allegedly had been requested (*id.* at A10-A11).

The district court denied petitioner's Rule 60(b) motion by memorandum endorsement. The court of appeals affirmed (Pet. App. A7-A15). It noted that a Rule 60(b) determination will only be reversed for abuse of discretion, and that Rule 60(b) requires a showing that the evidence was newly discovered and could not have been found by due diligence (Pet. App. A11). The court concluded that, in view of Beane's admissions that he knew "all along" about Schell's evidence, "it would be the height of whimsy to characterize Schell's present statement as 'truly newly discovered' evidence" (*ibid.*). The court further noted that Beane's explanations as to why he could not reach Schell between the end of 1980 and April 1982 were quite feeble and failed to specify what means Beane had used to attempt to locate Schell, other than to call a single telephone number (*id.* at A11-A12).

The court of appeals once again assessed double costs and $500 in attorneys fees — this time against Beane personally pursuant to 28 U.S.C. (Supp. V) 1927 (Pet. App. A15). The court found that the low quality of the two appeals and "the inconstancy of the representations and arguments made by Beane in [petitioner's] behalf at the trial and appellate levels * * * ha[d] unduly delayed the termination of this litigation and ha[d] caused the proceedings to be unreasonably and vexatiously multiplied" (*id.* at A13-A15).[4]

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[4]In addition to his inconsistent statements concerning whether he knew about an alleged September 1980 filing at the time of the filing, Beane gave different answers concerning his efforts to find Schell. He stated in his written submissions to the court that he had been unable to

3.a. Petitioner contends (Pet. 12-19) that its Rule 60(b) motion should have been granted by the district court. This contention plainly presents no issue worthy of this Court's consideration.[5] Rule 60(b) requires a showing that the evidence is newly discovered and could not, by due diligence, have been discovered in time to move for a new trial. See, *e.g., Pioneer Insurance Co.* v. *Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977). Petitioner's assertions that it exercised due diligence in trying to obtain Schell's affidavit (Pet. 12-16) are simply a quarrel with facts found by two courts below and present no issue warranting review by this Court. See, *e.g., Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). Petitioner's main argument — that the evidence was unavailable because Schell was in a mental institution — was not made until oral argument on appeal, was unsupported by documentary evidence, and was unsworn.[6] Its secondary argument that it could not afford to pay for more diligent efforts (Pet. 14) is insufficient and, moreover, absurd in light of petitioner's substantial financial resources.[7] Finally, petitioner never seriously disputes the court of

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locate Schell because he had been trying the wrong telephone number. Then, for the first time at oral argument on appeal, he told the court that he had been unable to locate Schell because Schell had been in a mental institution (Pet. App. A14).

[5]The appropriateness of the original summary judgment order, of course, is no longer an issue, because time to petition for review of the court of appeals' judgment on the first appeal has expired.

[6]*Nagell* v. *United States*, 354 F.2d 441, 448-449 (5th Cir. 1966), on which petitioner relies (Pet. 16), concerned information known only to a defendant in a criminal case, whose mental disorder "caused, if not compelled, him" to conceal the relevant information. Here, by contrast, the relevant information was also known to Beane, who makes no claim that mental disease compelled him to withhold the information.

[7]Petitioner's reported sales in the last quarter of 1979 were $32.6 million (Jt. App. A32).

appeals' determination that, regardless of diligence, the evidence was not newly discovered. Compare Pet. 12-13 with Pet. App. A11.[8]

b. Petitioner's challenge (Pet. 16-17) to the appropriateness of the sanctions assessed against attorney Beane is unsound. First, petitioner lacks standing to seek review of this part of the judgment because it is not subject to the order to pay costs and attorney's fees, which was entered against Beane. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 498-500 (1975). In any event, the history of this litigation, as set forth in the court of appeals' two opinions, demonstrates that the court did not abuse its discretion in imposing the penalties under 28 U.S.C. (Supp. V) 1927.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

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[8]Petitioner now asserts (Pet. 12-13) that Beane's recollection of what Schell told him was inadmissible hearsay, and it suggests that it was for this reason not offered by Beane. This claim is inconsistent with Beane's statement to the government attorney in October 1981 that Beane was not providing further information because he had none. Further, if Schell were truly unavailable, Beane could have sought to have his account of Schell's testimony admitted under Fed. R. Evid. 804(a). In fact, Beane made no offer at all, asserting that he could not tell the government which employee made the alleged filing.